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No. 82-577

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CAMPBELL INDUSTRIES, INC.;
ELDORADO INSURANCE CO., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR, ET AL.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Statutes:

33 U.S.C. 908(f) 2,3,4, 5,6,8, 9, 10, 11

3 U.S.C. 928(c) 12

STATUTES INVOLVED

1. §908(f) of the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. 908(f) provides in pertinent part:

> (f) Injury increasing disability: (1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. . . . In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.

(2) After cessation of the payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in section 944 of this title.

2. §928(c) of such Act, 333 U.S.C. 928 provides in pertinent part:

(c) In all cases fees for attorneys representing the claimant shall be approved in the manner herein provided. If any proceedings are had before the Board or any court for review of any action, award, order, or decision, the Board or court may approve an attorney's fee for the work done before it by the attorney for the claimant. An approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award; and the deputy commissioner, Board or court shall fix in the award approving the fee, such lien and manner of payment.

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Respondent, LOSTAUNAU, herein opposes Petitioner's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF CASE

Claimant, HUGO LOSTAUNAU, a waysman working for Petitioner, suffered orthopedic and

psychiatric injuries in the course and scope of his employment with Petitioner.

At the time of Trial before the Administrative Law Judge, extensive lay and expert evidence was offered by both parties. The Administrative Law Judge found that the Claimant was injured in the course and scope of his employment with Petitioner; the claimant was permanently and totally disabled solely as a result of the injury of September 16, 1973; the Claimant had no disability prior to the injury of September 16, 1973; and that the Petitioner was aware of no disability affecting Claimant at the time of hire or on September 16, 1973.

On the basis of these findings, the Claimant was awarded temporary total disability, permanent total disability and the Petitioner was denied §908(f) relief.

Petitioners then appealed to the Benefits Review Board, urging that the Claimant had a pre-existing partial disability

prior to September 16, 1973 and that this disability was "manifest" to the Petitioner prior to that date. The Benefits Review Board reversed the Administrative Law Judge, stating that "the evidence supports a finding that Claimant had a pre-existing permanent partial disability".

The Director then appealed to the Ninth Circuit Court of Appeals, alleging that the Benefits Review Board had exceeded its scope of review of the Administrative Law Judge's decision.

The Ninth Circuit Court of Appeals stated that the Petitioner herein did not meet the requirements for relief under §908(f) and that the Administrative Law Judge's finding was based upon substantial evidence.

REASONS FOR DENYING PETITION FOR CERTIORARI

I

PETITIONER'S PETITION FOR WRIT OF CERTIORARI IS BASED ON

FACTUAL QUESTIONS WHICH ARE NOT PROPERLY REVIEWABLE BY THIS COURT.

The only real questions the Petitioner raises in its petition involve the particular facts of this case alone and are of interest only to the parties to it. In essence, Petitioner asks this Court to make a third review of the Trial record to see if it can find what the Administrative Law Judge was unable to find. The Court has previously ruled that such fact canvassing is not a task to be served by a grant of certiorari. United States v. Johnson, 268 U.S. 220, 227 (1925)

In this case, Petitioner seeks relief under §908(f) of the Longshoremen's and Harbor Workers' Compensation Act. In order to obtain relief under §908(f), the employer must show (1) that the claimant had an existing permanent partial disability prior to the last injury; (2) that the disability was manifest to the employer; and (3) that the current disability is not due solely to the

most recent injury. Dillingham Corporation v. Massey, 505 F. 2d 1126, 1128 (9th Cir. 1974).

The three above-mentioned criteria required for §908(f) relief are factual showings for which both parties offered evidence at Trial. Following the offering of evidence at Trial, the Administrative Law Judge weighed the evidence and made a determination based on what he felt was the more credible evidence. Lay and medical witness credibility is an issue for the Administrative Law Judge to decide as the trier of fact. The Benefits Review Board must respect the Administrative Law Judge's evaluation of the evidence. Calbeck v. Strachan Shipping Co., 306 F. 2d 693 (5th Cir. 1962), cert. denied, 372 U.S. 954 (1963); John W. McGrath Corp. v. Hughes, 289 F. 2d 403 (2d Cir. 1961).

The review and change of the evidential findings of the Administrative

Law Judge, by the Board, was improper and contrary to established case law. The reinstatement of the Administrative Law Judge's decision by the Ninth Circuit Court of Appeals was entirely in accordance with law. Any further review of these evidential discrepancies are not within the purview of a grant of certiorari and on those grounds the Petition in this case should be denied.

II

THE COURT BELOW GAVE FULL CONSIDERATION TO THE ISSUE OF "EXISTING PERMANENT PARTIAL DISABILITY" AS USED IN §908(f) AND DECIDED CORRECTLY.

The Petitioner claims that the meaning of "existing permanent partial disability", as used in §908(f) of the Longshoremen's and Harbor Workers' Compensation Act, is confused to the point where its plain meaning is obscured. As a result, the Petitioner claims that the Ninth Circuit Court of Appeals was unable to properly decide whether such a disability did exist in

the present case.

Through the briefs of the parties, the Court of Appeals was apprised of the various standards for establishing an "existing permanent partial disability". In Atlantic and Gulf Stevedores, Inc. v. Director, OWCP, 542 F. 2d 602, 4 BRBS 79 (3d Cir. 1976), that Court held that such a disability was present where the disability was economically disabling. In Cordero v. Triple A Machine Shop, 580 F. 2d 1331, 8 BRBS 744, (9th Cir. 1978), the Court stated that such a disability was present where it interfered with the employee's ability to perform his work.

In the present case the Ninth Circuit was quite clear in applying the standard set forth in C & P Telephone v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), where it stated at pages 5 and 6:

> "The most accepted definition of disability in §8(f) is set forth in C & P Tel. Co. v. Dir, Office of Wkrs.' Comp. Prog., 564 F. 2d 503, 513 (D.C. Cir. 1977):

> '. . .To summarize, the term 'disability' in new §8(f) can be an economic disability under §8(c)(21) or one of the scheduled losses specified in §8(c)(1)-(20), but it is not limited to those cases alone. 'Disability' under new §8(f) is necessarily of sufficient breadth to encompass those cases, like that before us, wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of greatly increased risk of employment-related accident and compensation liability.'"

What we have is not a question of an "eroded" or "confused" statute. On the contrary, the meaning given to the statute by case law is quite clear. Petitioner simply did not show that there was an "existing permanent partial disability" at the time of hire or injury no matter what standard is applied.

III

THE PETITIONER FIRST PRESENTED ITS ARGUMENT OF STATUTORY INTERPRETATION OF §908(f) AT THE NINTH CIRCUIT COURT OF APPEALS AND THEREFORE HAD NOT

EFFECTIVELY PRESERVED ITS
RIGHT TO RAISE THAT ISSUE.

Before the Administrative Law Judge and the Benefits Review Board the Petitioner has argued that the Respondent's pre-existing disability was manifest to the employer at the time of hire and on the date of injury, giving the employer the right to §908(f) relief.

Before the Ninth Circuit Court of Appeals, for the first time, the Petitioner asserted that a proper reading §908(f) would not require the Petitioner to have knowledge of the Respondent's pre-existing disability as a condition precedent to §908(f) relief. Petitioner now asserts this same argument before this Court.

The Petitioner did not effectively preserve its right to assert this argument on appeal where it did not raise the issue in the Courts below and for that reason, its Petition must be denied.

IV

PETITIONER'S PROPOSAL TO ABOLISH THE "MANIFEST" REQUIREMENT FOR OBTAINING §908(f) RELIEF IS WITHOUT MERIT.

This Court in Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198, 69 S. Ct. 503 (1949), stated that one of the major purposes of §908(f) was the prevention of employer discrimination against handicapped workers.

The "manifest" requirement goes right to the heart of this stated purpose. Any such discrimination against a handicapped worker must rest upon knowledge of the handicap upon which the discrimination is based. American Mutual Insurance Company of Boston v. Jones, 426 F. 2d 1263 (1970). If the purpose of this legislation is as this Court stated in Lawson, supra, then the "manifest" requirement is impliedly a requirement for benefits under that legislation.

To cut out the "manifest" require-

ment as suggested by Petitioner, would only reward those employers who overwork and mistreat their employees. When the worker who becomes injured while working for such an employer applies for benefits, the employer must allege merely that that worker had a disability prior to hire. If that employer is not required to show that the prior disability was manifest at the time of hire or injury, after the initial 104-week benefit period, the Special Fund must foot the bill for this employer. The purpose of §908(f) is not to provide such a windfall to employers. American Mutual Insurance Company of Boston v. Jones, supra, at 1267.

Reckless employers should not be rewarded by being allowed to spread their liability amongst the other contributors to the Special Fund out of which §908(f) liabilities are paid. It would make more sense to tax each employer on the basis of the injury claims it has against it in order to fund the Special Fund. In that way, there

would be more incentive to provide a safe place in which to work.

REQUEST FOR ATTORNEY'S FEES

Respondent is entitled to an award of reasonable attorney's fees for responding to the Petitioner's Petition for Writ of Certiorari under 33 U.S.C. 928(c).

Repondent's attorney is a certified Workers' Compensation Specialist. Below please find an itemized statement of the extent and character of the legal services rendered in responding to the employer's petition.

Review of employer's Petition for Writ of Certiorari . . . . . 3 hours

Research on Section 8(f), time limit on response and cited cases . . . . . .3 hours

Draft Response to Petition for Writ of Certiorari . . . . . 6 hours

Total Time Spent: . . . . . .12 hours

Based on the corporate

hourly rate of $140.00, our reasonable attorney's fee would be $1,680.00.

CONCLUSION

Based on the above-enumerated points and authorities, the Petition for Writ of Certiorari should be denied and a reasonalble attorney's fee of $1,680.00 should be awarded to Claimant.

Respectfully submitted,

BRUNDAGE & ZELLMANN

By: _____
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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

I, DONALD W. ZELLMANN, counsel of record for Hugo Lostaunau, and a member of the Bar of the Supreme Court of the United States, hereby depose and say that on the 5th day of November, 1982, pursuant to Rule

33, I served the within RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on each of the several parties thereto as follows:

1. On the United States, by mailing three (3) copies in a duly-addressed envelope, with first-class postage prepaid to the Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On the United States Department of Labor, by mailing three (3) copies in a duly-addressed envelope, with first-class postage preapid to Marianne Demetral Smith, Esquire, Frances Perkins Building, 200 Constitution Avenue, N.W., Suite N-2620, Washington, D.C. 20210.

3. On Russell K. Lambeau, Esquire, Taylor, Jones and Wilson, Attorney for Campbell Industries, Inc.; Eldorado Insurance Co., by mailing three (3) copies in a duly-addressed envelope, with first-class postage prepaid to 2725 Congress Street, Suite 2E, San Diego, California 92110.

4. On the Clerk, United States Court of Appeals for the Ninth Circuit, by mailing one (1) copy in a duly-addressed envelope, with first-class postage prepaid to Post Office Box 547, San Francisco, CA. 94101.

It is further certified that all parties required to be served have been served, and that

the list of such parties is as set forth above.

DONALD W. ZELLMANN,
Counsel of Record for
Claimant, Hugo Lostaunau

Subscribed and sworn to
before me this 4th day
of November, 1982.

Notary Public in and for
said County and State